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Supreme Court of the United States

OCTOBER TERM, 1936

No. 652

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,
Appellants,

v.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, STATE OF LOUISIANA, ET AL.,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

SUPPLEMENTAL BRIEF FOR APPELLANT MONTGOMERY WARD & CO., INCORPORATED,

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HAUSER PRINTING CO., NEW ORLEANS

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SUPPLEMENTAL BRIEF FOR APPELLANT MONTGOMERY WARD & CO., INCORPORATED,

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STATEMENT OF THE CASE

The purpose of this brief is to discuss the effect of the Louisiana Chain Store Act upon a chain store operator which is extensively engaged in the conduct of interstate sales operations through mail order houses, order-taking units, and retail stores. The effect of the tax in question on these interstate operations is the basis on which this appellant has invoked the protection of the Commerce Clause of the United States Constitution in arguing that the tax is invalid. The facts regarding these

operations are set forth in the intervening petition of Montgomery Ward & Co., (R. 25-31) hereinafter referred to as Ward, and in the affidavits by J. A. Donaldson and C. B. Fullerton, filed in support thereof. R. 136-143. Inasmuch as the case has been submitted, by stipulation, upon affidavits and counter-affidavits, and the counter-affidavits of the defendants have not contradicted any of the facts in Ward's affidavits, the facts in Ward's affidavits may be regarded as admitted. R. 81.

In addition to the contentions made on behalf of all appellants in the principal brief, this appellant contends that the tax is invalid, as applied to it and the other mail order chain intervening herein, Sears, Roebuck & Co., because (1) it levies a flat tax for the privilege of operating stores partially engaged in interstate commerce and (2) the amount of the tax is fixed by the number of stores or mercantile establishments operated everywhere, some of which are exclusively engaged in interstate commerce.

Section Two of Act 51 (amending Section One of the prior act) levies an annual license tax on all persons "engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise, or commodities of every description whatsoever are sold or **offered for sale** at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores." R. 257 (emphasis ours). The amount of the tax "shall be based on the number of stores **or mercantile establishments** included under the same general management, supervision, ownership, or control, whether operated in this State or not * * *" Section Three, R. 257, (emphasis ours). The foregoing record references refer to the quotations from the statute

found in the opinion. The full text does not appear in the record but is printed as an appendix to the appellants' main brief.

As of January 31, 1935, Ward operated 17 large department stores, 456 retail stores of limited size carrying a limited line of merchandise, and 16 small stores devoted exclusively to the sale of hardware, household appliances, automobile tires and tubes. R. 137. Five of the retail stores of limited size, designated as Class "B" stores, were operated in the State of Louisiana, and are the stores to which the tax herein contested is sought to be applied. R. 138. In addition to the retail store business carried on in the aforesaid chain of stores, Ward operated 9 mail order establishments engaged in warehousing, selling and shipping a complete line of merchandise to all parts of the United States and foreign countries on orders received by mail, which were respectively located at Albany, New York; Baltimore, Maryland; Chicago, Illinois; Denver, Colorado; Fort Worth, Texas; Kansas City, Missouri; Oakland, California; Portland, Oregon; and St. Paul, Minnesota. R. 138. As an additional part of this mail order business, 19 order offices were maintained in the States of Florida, Georgia, Minnesota, New York, and Wisconsin, which consisted merely of rooms or offices where catalogs and samples were displayed, but no stocks were carried. R. 138. Sales in these units were made by means of the regular catalog orders used by individual customers, which were forwarded by the order-taking units to the various mail order establishments for acceptance and direct shipment of the merchandise to the customer. R. 138. The five Louisiana stores were also operated as order-taking units for the mail order establishment operated at Fort Worth, Texas, in addition to carrying a regular stock of merchandise which was sold over the counter. R. 139. Catalogs were displayed at these

stores and customers were able to purchase merchandise by filling out a catalog order at the store, which was in turn transferred by the store to the Fort Worth mail order house and the merchandise was shipped direct to the customer as in any mail order transaction. R. 139.

In addition to the catalog order business, the Louisiana stores also made interstate sales for their own account of merchandise not stocked by them, which they ordered direct from the factory or mail order warehouse where it was stocked, and which the factory or mail order warehouse shipped direct to the customer. Inasmuch as Ward deals with no factories in Louisiana, all of said shipments were necessarily interstate shipments. R. 139. The volume of these interstate shipments of store orders was 4% of the total sales volume of the stores, and the volume of the catalog mail orders handled by the store was an additional 5% of the total volume of sales. R. 139. About 67% of all the sales made by the nine mail order establishments required interstate shipments of merchandise, and 100% of the sales made by the order taking units located in states where Ward did not maintain a mail order house required an interstate shipment of the merchandise. R. 140.

The court below attempted to dispose of our contention by stating that the statute directly applies only "where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail." R. 263. As there was no further discussion of the point, the lower court impliedly held that the quoted language was sufficient to limit the scope of the Act to intrastate operations. We therefore propose to show in the ensuing argument that the statute does, insofar as the mail order chains are concerned, directly apply to inter-

state mercantile business and lays a direct burden upon the interstate commerce carried on by this appellant.

The assigned error intended to be urged is number (12), which is as follows:

> "The court erred in failing to hold that the Louisiana statute places a direct burden upon interstate commerce operations in the mail order business of intervenors Montgomery Ward & Co. and Sears, Roebuck & Company." R. 277.

SUMMARY OF ARGUMENT

I.

WARD'S LOUISIANA STORES, ITS MAIL ORDER HOUSES AND ORDER OFFICES ARE ALL STORES OR MERCANTILE ESTABLISHMENTS WITHIN THE MEANING OF THE LOUISIANA CHAIN STORE ACT.

Act 51 of the Louisiana Legislature of 1934, Sections 2 and 3;

Webster's New International Dictionary.

II.

WARD'S RETAIL STORES, MAIL ORDER HOUSES, AND ORDER OFFICES ARE ALL PARTIALLY OR WHOLLY ENGAGED IN INTERSTATE COMMERCE.

Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52;

Montgomery Ward & Co., Inc., v. Fry, et al., 277 Michigan 250, 269 N. W. 166;

Robbins v. Taxing District of Shelby County, 120 U. S. 489.

III.

THE TAX IS INVALID BECAUSE IT IS LEVIED FOR THE PRIVILEGE OF OPERATING STORES CON-

DUCTING BOTH INTRASTATE AND INTERSTATE BUSINESS AND THE TAX IS NOT DIVISIBLE IN ACCORDANCE WITH THE RESPECTIVE AMOUNTS OF INTRASTATE AND INTERSTATE BUSINESS TRANSACTED.

Bowman v. Continental Oil Co., 256 U. S. 642;

Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384.

IV.

THE TAX IS INVALID BECAUSE IT DIRECTLY APPLIES TO LOUISIANA UNITS WHOLLY ENGAGED IN INTERSTATE COMMERCE AND IS PARTLY MEASURED BY INTERSTATE OPERATIONS CARRIED ON WHOLLY OUTSIDE THE STATE OF LOUISIANA.

Fisher's Blend Station, Inc. v. Tax Commissioner, 297 U. S. 650;

Montgomery Ward & Co., Inc. v. Fry, et al., 277 Michigan 250, 269 N. W. 166;

Rearick v. Pennsylvania, 203 U. S. 507.

ARGUMENT

I.

WARD'S LOUISIANA STORES, ITS MAIL ORDER HOUSES AND ORDER OFFICES ARE ALL STORES OR MERCANTILE ESTABLISHMENTS WITHIN THE MEANING OF THE LOUISIANA CHAIN STORE ACT.

The word "mercantile" is defined by Webster's New International Dictionary as "Of or pertaining to merchants, or the business of merchants, characteristic of, or befitting a merchant, having to do with, or engaged in, trade, or the buying and selling of commodities; com-

mercial." The word "establishment" is defined by the same source as "The place where one is permanently fixed for residence or business * * * also, any office or place of business, with its fixtures." The word "store", Webster defines as "Any place where goods are kept for sale, whether by wholesale or retail; a shop." We think it is apparent without further burdening the court with dictionary definitions, that the phrase "stores or mercantile establishments" in Section Three of the Act was obviously used by the Louisiana Legislature to reach not merely business establishments selling at retail from a local stock of goods, but retail businesses of every description. The words quoted by the court below, "where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail", (R. 263) which qualify the words" store or stores" in Section Two, do not restrict the tax to places selling at retail from a local stock, the words "or offered for sale" being apparently expressly intended to include stores where merchandise is not stocked or sales consummated but which act merely as retail sales agencies.

Ward's five Louisiana stores do a retail business from their local stocks and also offer mail order merchandise for sale as agents for the Fort Worth mail order house. R. 139. Ward's order offices all offer merchandise for sale by displaying catalogs and samples. R. 138. The nine mail order houses conduct mainly an interstate retail business, and the order offices in states where no mail order house is located do an exclusively interstate business. R. 140. Yet, it is clear that every one of these business units is a "store" where merchandise is "offered for sale" or a "mercantile establishment" as those terms are used in the Act. Were it not for the implication arising from the opinion below, that the language of the Act

excluded interstate business from its operation, we should not have thought this point required discussion.

II.

WARD'S RETAIL STORES, MAIL ORDER HOUSES, AND ORDER OFFICES ARE ALL PARTIALLY OR WHOLLY ENGAGED IN INTERSTATE COMMERCE.

In our statement of the case, we pointed out that 9% of the sales made by the Louisiana stores were sales in which orders were taken for merchandise to be shipped direct to the customer from outside the state, that 67% of the orders sent to Ward's mail order houses required interstate shipments of merchandise and that 100% of orders sent to Ward's order offices located in states where there was no mail order house required the interstate shipment of merchandise. R. 139-140. All of these units were, to a greater or lesser extent, engaged in interstate commerce as that term has been defined by the decisions of this court. In *Federal Trade Commission v. Pacific States Paper Trade Associations*, 273 U. S. 52, 64, the court said of interstate commerce, "such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another." In *Robbins v. Taxing District of Shelby County*, 120 U. S. 489, 492, the court said, "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

We think it is clear from these definitions that the sales made by the Ward stores, mail order houses, and order offices which required the interstate shipment of merchandise, were sales made in interstate commerce,

and the Supreme Court of Michigan has so held in *Montgomery Ward & Co., Inc. v. Fry, et al.*, 277 Michigan 250, decided October 5, 1936. This case involved the application of the Michigan Sales Tax Act to Ward stores in Michigan, which solicited orders for the Chicago mail order house and offered catalog merchandise for sale in the same way that the Louisiana stores solicit orders for the Fort Worth mail order house. The Michigan tax was levied for the privilege of making retail sales and was measured by the gross proceeds thereof less certain statutory deductions. The State Board of Tax Administration attempted to include in the measure of the tax, orders taken by the Michigan retail stores as agents for the Chicago mail order house and sales made by the stores which required the shipment of the goods sold from outside the state. The court held that Ward's tax could not be measured by such sales, on the ground that these transactions were interstate commerce. We know of no decisions holding otherwise.

III.

THE TAX IS INVALID BECAUSE IT IS LEVIED FOR THE PRIVILEGE OF OPERATING STORES CONDUCTING BOTH INTRASTATE AND INTERSTATE BUSINESS AND THE TAX IS NOT DIVISIBLE IN ACCORDANCE WITH THE RESPECTIVE AMOUNTS OF INTRASTATE AND INTERSTATE BUSINESS TRANSACTED.

The general rule governing state occupational taxes was recently stated in *Cooney v. Mountain States Tel. & Tel. Company*, 294 U. S. 384, at pages 392-393 as follows:

> "There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate com-

> merce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable, does not justify a tax either upon the interstate business or upon the whole business without discrimination. * * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

If the Louisiana tax were levied solely for the privilege of making intrastate sales, the fact that the taxed establishments were also engaged in making interstate sales would be of no importance. This intervenor now pays to the municipalities in which its Louisiana stores are located license taxes for the privilege of transacting local business. R. 26.

However, the chain store tax is not measured by the volume of intrastate business transacted, but is a flat sum payment for each sales unit operating within the state, without regard to whether the unit is engaged in intrastate or interstate selling. It is, in its effect on interstate commerce, a tax similar to the New Mexico license tax considered by this court in *Bowman v. Continental Oil Company*, 256 U. S. 642. The court found in that case that 94.5% of the oil company's business consisted of intrastate sales, but the remaining 5.5% of the sales required direct original package shipments from outside the state, which sales were interstate commerce. The court held that the $50.00 annual license

tax imposed by the State of New Mexico on "each distributing station or place of business' (p. 643) for the privilege of selling gasoline was invalid in its entirety because it was not divisible in accordance with the respective proportions of interstate and intrastate business conducted by the oil company's stations. We do not believe that the Louisiana license tax here in question is distinguishable in its effect upon interstate business from the New Mexico license tax there considered. The proportion of the interstate sales handled by the New Mexico stations, (5.5%) although less than the proportion of interstate sales handled by Ward's Louisiana stores, (9%) was sufficient to invalidate the New Mexico tax as to those stations. We respectfully submit that the Louisiana tax is equally invalid as to the Louisiana stores of this intervenor.

IV.

THE TAX IS INVALID BECAUSE IT DIRECTLY APPLIES TO LOUISIANA UNITS WHOLLY ENGAGED IN INTERSTATE COMMERCE AND IS PARTLY MEASURED BY INTERSTATE OPERATIONS CARRIED ON WHOLLY OUTSIDE THE STATE OF LOUISIANA.

Paragraph (16) of Section Three of the Act provides for a tax of $550.00 "upon stores or mercantile establishments operated in this state" belonging to a chain of more than five hundred stores. Ward would thus be compelled to pay a license tax for each separate order office that it might establish in the State of Louisiana. Inasmuch as Ward has no mail order house in Louisiana, (R. 138) any order office established there would be engaged in making interstate sales only. Such units would be exclusively engaged in interstate commerce and therefore not subject to state retail license taxation. *Rearick v.*

Pennsylvania, 203 U. S. 507; *Montgomery Ward & Co., Inc. v. Fry, et al.*, 277 Michigan 250. Yet, the Louisiana Act has imposed a license tax which in effect, prohibits the establishment of such units in the state.

Moreover, the State of Louisiana has not merely undertaken to levy direct and indivisible taxes upon units operated in the state regardless of whether or not they are engaged in interstate commerce, but has measured this tax according to the total number of stores or mercantile establishments owned or controlled by the tax payer regardless of their character or location. The effect of including ordinary stores operated outside the state in the computation by which the tax is measured has been argued in the appellants' main brief. We only wish to point out here the effect of including stores and mercantile establishments which are mainly or wholly engaged in interstate commerce. When the mail-order-taking units are included in the computation, the result is that the tax is being partly measured by the operation of a purely interstate business which may not be used as a measure for license taxation by any state. *Fisher's Blend Station, Inc. v. Tax Commissioner*, 297 U. S. 650; *Montgomery Ward & Co., Inc. v. Fry, et al.*, 277 Michigan 250.

Ward's 9 mail order houses and 19 order offices, (R. 138) when added to its 489 retail stores (R. 137) for classification purposes, as the Act requires, increase the tax paid by Ward's five Louisiana locations to $550.00 each, instead of $500.00. R. 259. The total tax would thus be increased by $250.00 by virtue of Ward's mail order operations, and the $250.00 levy thus computed is clearly a direct burden on those operations. While the total tax is nominally levied against the Louisiana locations, the payment is made, not out of profits derived from oper-

ating those stores, as they all show a loss, (R., 138-139) but from the other operations of the corporation, including its interstate mail order business.

CONCLUSION

In conclusion, we should like to point out that the interstate mail order business of this intervenor has subjected it to stringent Federal regulation, (R. 140-143) and the exemption from state regulation claimed in this case under the commerce clause is co-extensive with the Federal power to regulate the exempted activities. We respectfully submit that the Louisiana Chain Store Act taxes and thereby regulates the purely interstate operations of this appellant and Sears, Roebuck & Co., in direct violation of the exclusive power granted to the Federal Government under the Commerce Clause of the United States Constitution, and should be held invalid as to them upon that ground, in addition to the grounds specified in the appellants' principal brief.

Respectfully submitted,
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